STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
D & C GLASS CORP. AND	:	ORDER DTA #808344
DENNIS ALLEYNE, AS OFFICER	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1985 through February 29, 1988.	:	

Petitioners, by a motion for summary determination, dated April 22, 1991, seek an order granting their petition and cancelling a determination that additional sales and use taxes are due. Based upon documents submitted by petitioners' representative, Isaac Sternheim, C.P.A., with their motion and the affirmation of Robert J. Jarvis, Esq., dated May 31, 1991, in opposition to petitioners' motion, the following order is rendered.

ISSUE

Whether the Division of Taxation may retract a notice of cancellation and discontinuance that cancelled a determination of additional sales and use taxes.

FINDINGS OF FACT

The Division of Taxation assessed additional sales and use taxes as due against petitioners, D & C Glass Corp. and Dennis Alleyne, based upon a test period audit which estimated the sales and use tax liability of petitioners.

The affirmation in opposition of Mr. Jarvis notes:

> "Over a period of several months, Mr. Andrew Haber, the Law Bureau attorney previously assigned to this case, attempted toobtain copies of the documents needed for presenting this matter at a formal hearing."

A memorandum dated November 20, 1990 from Mr. Haber to David Jos, of the Metropolitan District Office, shows Mr. Haber's inability to obtain the audit file for this matter:

"I have requested the audit file from Ms. Miles of your office. She was unable to get the file that was from the former Brooklyn office.

* * *

I need a complete audit file with at least copies of the audit report, Notices of Determination and Demand, the consents by the taxpayer to audit method, and any other consents. It would be helpful if the file contained the contact letter and workpapers."

This memorandum shows a carbon copy to Robert Brady of the former Audit Evaluation Bureau.

Approximately five months later, on April 17, 1991, Mr. Haber, who had been unable to obtain (in Mr. Jarvis' words) "the required documents as of that date", filed[1] a Division of Tax Appeals form, TA-34, "Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding" with the Division of Tax Appeals in this matter. This document executed by Mr. Haber on April 17, 1991 provided as follows:

"Please take notice that the Division of Taxation, after review of the above-captioned matter, hereby agrees to cancel the deficiency/determination...as of this date."

The notice was transmitted by the following letter to Daniel J. Ranalli, Assistant Chief Administrative Law Judge:

"The Division of Taxation has reviewed the determination in this matter and has decided to cancel the determination. Attached is a Notice of Cancellation of Deficiency/Determination and Discontinuance of Proceeding closing out this matter before the Division of Tax Appeals.

We are marking this matter as closed on our records."

This transmittal letter also shows a carbon copy to petitioners' representative and to the calendar clerk of the Division of Tax Appeals.

On the same date of April 17, 1991, Mr. Haber also wrote the following memorandum to David Jablonski, Program Manager of the Policy and Compliance Section of the Division of Taxation:

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[1]Mr. Haber filed the notice in the name of William F. Collins, Deputy Commissioner and Counsel of the Department of Taxation and Finance.

"I am enclosing the Litigation file for the above referenced matter. I am forced to close this matter since neither Mr. Jos of the Metropolitan District Office nor your office was able to provide me with an adequate file to try this case. In response to my memo of 11/20/90 [described in Finding of Fact "3", supra], Mr. Jos in his memo of 12/3/90 states that the district office file was probably lost in the move to Hanson Place and would try to get DOAB Sales to obtain the Albany file which was never provided. Your office has not provided an adequate file.

This case is a test period audit that [sic] taxpayer challenges the audit method and without an audit report this case cannot be tried."

Two days later, on April 19, 1991, Michael Alexander, Director of Litigation for the Law Bureau, telephoned Assistant Chief Administrative Law Judge, Daniel J. Ranalli, (in Mr. Jarvis' words) "to advise him that Mr. Haber's letter of April 17, 1991 had been sent in error and that the discontinuance of proceeding form which accompanied Mr. Haber's letter was being retracted." Mr. Alexander confirmed this conversation in a letter dated April 19, 1991 which provided as follows:

"This is to confirm our telephone conversation of same date [April 19, 1991] that the letter of April 17, 1991 from Andrew Haber of my staff regarding the notice of cancellation and discontinuance of the above proceeding was sent in error and is hereby retracted.

The representative for the taxpayer who [sic] will also be advised of this error to avoid any prejudice it may create."

A copy of this letter was sent to the taxpayer's representative.

According to Mr. Jarvis' affirmation, "(i)mmediately thereafter [Mr. Haber's filing of the discontinuance] it came to the attention of the Law Bureau that the audit file containing the requested documents was available after all."

Three days after his receipt of a copy of Mr. Alexander's letter dated April 19, 1991 which sought to retract the notice of cancellation and discontinuance, petitioner's representative brought this motion for summary determination based upon Mr. Haber's filing of the notice of cancellation and discontinuance.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners rely on the notice of cancellation and discontinuance and challenge the Division of Taxation's attempt to retract it.

The Division of Taxation argues that it should be allowed to retract the notice of cancellation and discontinuance because "the actions taken by the Tax Department were all unilateral in nature. No exchange of consideration with petitioners was involved." It also contends that the Division of Taxation may not be estopped from asserting tax due against petitioners because petitioners have not "alleged that the actions taken by the Tax Department have had any adverse effect on petitioners. Moreover, if petitioners did allege those elements [for equitable estoppel] such allegations would immediately cause the type of triable issues of fact that require a hearing to determine whether the allegations are true." Finally, the Division of Taxation argues that petitioners' motion papers were defective because they failed to include a supporting affidavit and copies of the pleadings.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.5(c) provides as follows:

> "(1) After issue has been joined (see § 3000.4[b] of this Part), any party may move for summary determination. Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion.
>
> (2) Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, the administrative law judge may deny the motion or may order a continuance to permit affidavits or admissions to be obtained and may make such other order as may be just.
>
> (3) A determination of an administrative law judge denying the motion for summary determination is not subject to review by the tribunal."

B. The above-cited regulation notes that a motion for summary determination "shall be supported by an affidavit, by a copy of the pleadings and by other available proof." Although petitioners' motion is not supported by an affidavit or a copy of the pleadings, the basis for their motion is plain: a determination of additional sales and use tax asserted as due against them

was cancelled by the notice of cancellation and discontinuance described in detail in Finding of Fact "4", supra. Petitioners' motion rests entirely on their contention that this document should be given effect. The fact that their motion was not supported by an affidavit or a copy of the pleadings should not lead to the elevation of form over substance, and the denial of their motion on technical grounds. In addition, the taxpayer, who is not represented by an attorney, has been compelled to bring this motion when the underlying issue is whether the Division of Taxation should be allowed to reopen a matter that had been discontinued by its attorney, Andrew Haber. It would seem that the Division of Taxation should have shouldered the burden of bringing a motion to reopen. Instead, by Mr. Alexander's improper ex parte phone call, it tried to reopen a matter that had been closed (cf., Code of Professional Responsibility, Disciplinary Rule 7-110 and Ethical Consideration 7-35). Nonetheless, the issue whether the Division of Taxation may retract the notice of cancellation and discontinuance may be addressed and resolved on the record that has been created for this motion by the parties.

C. As noted in Finding of Fact "6", supra, it is the Division's position that "Mr. Haber's letter of April 17, 1991 had been sent in error and that the discontinuance of proceeding form which accompanied Mr. Haber's letter was being retracted." However, this contention that Mr. Haber's letter of April 17, 1991, which transmitted the notice of cancellation and discontinuance, was sent "in error" is rejected. It is well-established law that if this matter had come to hearing the Division of Taxation would have been required to provide some rational basis for the sales and use tax asserted as due against petitioners (cf., Matter of Fokos Lounge, Inc., Tax Appeals Tribunal, March 7, 1991). Therefore, Mr. Haber's submission of a notice of cancellation and discontinuance based upon his inability to obtain an audit report after apparently repeated attempts cannot be viewed as having been done "in error".

D. In Williamson v. John D. Quinn Construction Corp. (537 F Supp 613), an attorney withdrew his client's counterclaim in a construction contract lawsuit after his client "failed to produce credible evidence or documentary proof to substantiate the counterclaim...." As a result, the United States District Court, Southern District of New York, in Williamson, supra,

rejected the client's subsequent counterclaim against its lawyer (who had sued for his fees) that the counterclaim in the construction contract lawsuit was "withdrawn without its authorization or informed consent."

Similarly, the Division of Taxation, Mr. Haber's client, had failed to provide adequate assistance and evidence to support a determination of additional sales and use taxes against petitioners. As a result, Mr. Haber cancelled the determination. It is observed that the audit documents became available only after the filing of the notice at issue.

E. The United States Supreme Court in Link v. Wabash Railroad Co. (370 US 626), in a 4-3 decision, determined that a plaintiff was bound by his attorney's failure to prosecute his tort lawsuit against a defendant railroad. The attorney failed to appear at a pretrial conference and lacked a good excuse for such failure. Justice Harlan observed:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent..." (Link v. Wabash Railroad Co., supra at 634).

The dissent's concern was for the unsophisticated litigant:

> "Lawyers everywhere in this country are granted licenses presumably because of their skill, their integrity, their learning in the law and their dependability. While there may be some clients sophisticated enough in the affairs of the world to be able to select the good from the bad among this mass of lawyers throughout the country, this unfortunately cannot always be the case. The average individual called upon, perhaps for the first time in his life, to select a lawyer to try a lawsuit may happen to choose the best lawyer or he may happen to choose one of the worst. He has a right to rely at least to some extent upon the fact that a lawyer has a license. From this he is also entitled to believe that the lawyer has the ability to look out for his case and that he should leave the lawyer free from constraint in doing so. Surely it cannot be said that there was a duty resting upon Link, a layman plaintiff, to try to supervise the daily professional services of the lawyer he had chosen to represent him. How could he know, even assuming that it is true, that his lawyer was a careless man or that he would have an adverse effect upon the trial judge by failing to appear when ordered? How could he know or why should he be presumed to know that it was his duty to see that the many steps a lawyer needs to take to bring his case to trial had been taken by his lawyer? Why should a client be awakened to his lawyer's incapacity for the first time by a sudden brutal pronouncement of the court: 'Your lawyer has failed to perform his duty in prosecuting your case and we are therefore throwing you out of court on your heels'? So far as this record shows, the plaintiff never received one iota of information of any kind, character or type that should have put him on notice as an

ordinary layman that his lawyer was not doing his duty [emphasis added]" (Link v. Wabash Railroad Co., supra at 646 - 647).

In contrast, in the matter at hand, Mr. Haber had put his client on notice over a period of months that he could not proceed without the audit report. The dissent's concern, in Link v. Wabash Railroad Co., supra, for the innocent and unsophisticated client is inapposite.

F. In its letter brief submitted with its papers in opposition, the Division of Taxation's primary argument, as noted in Paragraph "10", supra, is rooted in an attempt to convert petitioners' position into one based upon equitable estoppel. This attempt to transmogrify must be rejected. Petitioners do not assert that the Division of Taxation should be estopped from asserting additional sales and use tax due. Rather, they merely seek to give effect to a notice of cancellation and discontinuance filed by the Division of Taxation's attorney.

G. The other substantive argument made by the Division of Taxation, as noted in Paragraph "10", supra, is a quasi-contract argument that is without merit.

H. It must be emphasized that, at no time, has the Division of Taxation alleged that Mr. Haber was not acting within the scope of his duties as an attorney for the Division of Taxation or lacked authority to file the notice that the Division now wishes to retract. As noted in Finding of Fact "4", the notice of cancellation and discontinuance was transmitted in the name of Deputy Commissioner and Counsel William F. Collins, by Mr. Haber, and the Division of Taxation has not asserted that Mr. Haber was without authority to do so. Rather, the factual basis for the Division of Taxation's opposition to petitioners' motion is, as noted in Finding of Fact "7", supra, based upon the fact that immediately after Mr. Haber's filing of the notice "it came to the attention of the Law Bureau that the audit file containing the requested documents was available after all." The Division does not assert that Mr. Haber lacked authority or its informed consent to file the notice in the first instance.

I. Consequently, caselaw that would provide a basis for relieving a client of its attorney's compromising or settling its case, based upon the attorney's lack of authority to do so, is irrelevant to the matter at hand (see, e.g., Prate v. Freedman, 583 F2d 42; Hallock v. State, 64

NY2d 224, 485 NYS2d 510; Jones v. Merit Truck Renting Corp., 17 AD2d 779, 232 NYS2d 519).

J. The motion of petitioners is granted. The notice of cancellation and discontinuance may not be retracted by the Division of Taxation, and the statutory assessment notice(s) covered by this matter are cancelled.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE